

***United States Court of Appeals
for the
District of Columbia Circuit***



**TRANSCRIPT OF
RECORD**

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Court of Appeals of the District of Columbia.

APRIL TERM, 1919.

No. 3272 **574**

LOUIS MANDES, APPELLANT,

VS.

THOMAS O. MIDGETT.

APPEAL FROM THE SUPREME COURT OF THE DISTRICT OF
COLUMBIA.

FILED APRIL 30, 1919.

PRINTED MAY 16, 1919.

Court of Appeals of the District of Columbia.

APRIL TERM, 1919.

No. 3272.

LOUIS MANDES, APPELLANT,

vs.

THOMAS O. MIDGETT, APPELLEE.

APPEAL FROM THE SUPREME COURT OF THE DISTRICT OF
COLUMBIA.

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Court of Appeals of the District of Columbia.

No. 3272.

LOUIS MANDES, Appellant,

vs.

THOMAS O. MIDGETT.

a Supreme Court of the District of Columbia.

At Law. No. 59769.

THOMAS O. MIDGETT, Plaintiff,

vs.

LOUIS MANDES and JOHN SURACI, Defendants.

UNITED STATES OF AMERICA,
District of Columbia, ss:

Be it remembered, that in the Supreme Court of the District of Columbia, at the City of Washington, in said District, at the times hereinafter mentioned, the following papers were filed and proceedings had, in the above-entitled cause, to wit:

1 *Declaration.*

Filed December 1, 1916.

In the Supreme Court of the District of Columbia.

Law. No. 59769.

THOMAS O. MIDGETT, Plaintiff,

vs.

LOUIS MANDES and JOHN SURACI.

First Count. The plaintiff, Thomas O. Midgett, sues the defendants, Louis Mandes and John Suraci, for that whereas, heretofore, to wit on or about the 9th day of September, A. D., 1916, the defendant Louis Mandes, at the time of the commission of the grievances hereinafter mentioned, and prior thereto, was conducting a lunch room.

business in the City of Washington, District of Columbia, and that in the conduct and operation of the said business the defendant owned and used a certain automobile or gasoline vehicle for delivery purposes; that on or about the said above mentioned date the defendant John Suraci was the driver of the automobile or gasoline vehicle as aforesaid, operating the same, and using the same in the conduct of the business of the defendant Mandes in making delivery for him to his lunch rooms in the City of Washington, District of Columbia; that in operating and driving said automobile or gasoline vehicle over the streets, avenues, highways and bypaths in the City of Washington, District of Columbia, as aforesaid, it became and was the duty of the defendant Louis Mandes the owner of said automobile or gasoline vehicle and defendant Suraci, the driver of the automobile or gasoline vehicle of the said defendant Mandes to so drive the said automobile or gasoline vehicle as not to injure anyone on said

2 streets, avenues, highways or bypaths in the said City and District, yet, notwithstanding the defendants' respective duties in this regard, on or about the date aforesaid, while the plaintiff was lawfully standing in a driveway of a gasoline station, located at or about the northwest corner of Rhode Island Avenue and Eleventh Street, N. W., in the City of Washington, District of Columbia, and without negligence on his part, the automobile or gasoline vehicle driven by the defendant Suraci in the business of the defendant Mandes, and owned by the defendant Mandes, was guided and driven so carelessly, negligently in that the driver of said machine ran against and over the plaintiff while he was standing as aforesaid engaged in putting or having gasoline placed in the tank of the motor cycle of the plaintiff, the said plaintiff being in full view of the defendant driver, and the defendant driver saw, or with the exercise of reasonable care could have seen the plaintiff but without regard thereto the defendant driver, while engaged in the business of the defendant Mandes, carelessly and negligently ran against and over the plaintiff; that no warning was sounded; no notice of any kind was given by the driver of said automobile or gasoline vehicle to the plaintiff, no opportunity was given the plaintiff to get out of the way of the rapidly moving automobile or gasoline vehicle driven by the defendant Suraci as aforesaid; that in running against and over the plaintiff as aforesaid the plaintiff received and was caused many severe and permanent injuries, to wit, severe and permanent injury to his skull, and a fracture of the skull resulting in concussion of the brain and other injury to the brain, and permanent injury to his head; that his right ear drum was broken or injured, resulting in permanent

3 deafness to the right ear; that both lungs of the said plaintiff were permanently and severely injured that his back was sprained and otherwise seriously and permanently injured.

Plaintiff received a severe and permanent nervous shock, resulting in a permanent nervous condition, all of which said injuries have incapacitated the plaintiff in the pursuit of his calling, which was that of a collector, and the said injuries are of such a character as to prevent him from doing any similar work or any work which requires the free use of his body and limbs, thereby causing a loss in salary to

the plaintiff of \$110 per month, which was the amount of salary received by the plaintiff at the time of the injury. Plaintiff expended large sums in doctors' bills and medicine in his efforts to be cured of his said injuries as aforesaid, amounting to a loss to the plaintiff in the sum of \$—.

By means of the premises the plaintiff was then and there greatly bruised hurt and wounded and became and was sick, sore, lame and disordered for a long space of time, to wit, hitherto, and will continue and remain in the future, all to the damage of the plaintiff in the sum of \$30,000.

Wherefore the plaintiff brings this suit and claims of the said defendants the sum of \$30,000, besides the costs of this suit.

Second Count. The plaintiff, Thomas O. Midgett, further sues the defendants, Louis Mandes and John Suraci, for that whereas heretofore, to wit, on or about the 9th day of September, A. D., 1916, the defendant, Louis Mandes, at the time of the commission of the grievances hereinafter mentioned, and prior thereto, was conducting a

4 lunch room business in the City of Washington, District of Columbia, and that in the conduct and operation of the said business the defendant owned and used a certain automobile or gasoline vehicle for delivery purpose-; that on or about the said above mentioned date the defendant John Suraci was the driver of the automobile or gasoline vehicle as aforesaid, operating the same, and using the same in the conduct of the business of the defendant Mandes in making delivery for him to his lunch rooms in the City of Washington, District of Columbia; that in operating and driving said automobile or gasoline vehicle over the street, avenues, highways and bypaths in the City of Washington, District of Columbia, as aforesaid, it became and was the duty of the defendant Louis Mandes as owner of said automobile or gasoline vehicle and defendant Suraci, the driver of the automobile or gasoline vehicle of the said defendant Mandes to so drive the said automobile or gasoline vehicle as not to injure anyone on said streets, avenue, highways or bypaths in the said City and District, yet, notwithstanding the defendants' respective duties in this regard, on or about the date aforesaid, while the plaintiff was lawfully standing in a driveway of a gasoline station, located at or about the northwest corner of Rhode Island Avenue and Eleventh Street, N. W., in the City of Washington, District of Columbia, and without negligence on his part, the automobile or gasoline vehicle driven by the defendant Mandes, was guided and driven so carelessly and so negligently by the defendant driver, Suraci, and by reason of the incompetency and unskilfulness of the driver of the said machine, which incompetency defendant well knew, or should have known, the plaintiff, without warning or notice, was suddenly run into by said

5 machine and thrown violently to the ground and run over by said automobile or gasoline vehicle of the said defendant causing many severe and permanent injuries to said plaintiff, to wit, severe and permanent injury to his skull, and fracture of the skull resulting in concussion of the brain and other injury to the brain, and permanent injury to his head; that his right ear drum was broken or injured, resulting in permanent deafness to the right ear;

that both lungs of the said plaintiff were permanently and severely injured, that his back was sprained and otherwise seriously and permanently injured.

Plaintiff received a severe and permanent nervous shock, resulting in a permanent nervous condition, all of which said injuries have incapacitated the plaintiff in the pursuit of his calling, which was that of a collector, and the said injuries are of such a character as to prevent him from doing any similar work or any work which requires the free use of his body and limbs, thereby causing a loss in salary to the plaintiff of \$110 per month, which was the amount of salary received by the plaintiff at the time of the injury. Plaintiff expended large sums in doctors' bills and medicines in his efforts to be cured of his said injuries as aforesaid, amounting to a loss to the plaintiff in the sum of \$—.

By means of the premises the plaintiff was then and there greatly bruised, hurt and wounded, and became and was sick, sore, lame and disordered for a long space of time, to wit, hitherto, and will continue and remain in the future, all to the damage of the plaintiff in the sum of \$30,000.

Wherefore plaintiff brings this suit and claims of the said defendants the sum of \$30,000 besides the costs of this suit.

6 Third Count. The plaintiff, Thomas O. Midgett, further sues the defendants, Louis Mandes and John Suraci, for that whereas, heretofore, to wit, on or about the 9th day of September, A. D., 1916, the defendant, Louis Mandes, at the time of the commission of the grievances hereinafter mentioned, and prior thereto, was conducting a lunch room business in the City of Washington District of Columbia, and that in the conduct and operation of the said business the defendant owned and used a certain automobile or gasoline vehicle for delivery purposes; that on or about the said above mentioned date the defendant John Suraci was the driver of the automobile or gasoline vehicle as aforesaid, operating the same, and using the same in the conduct of the business of the defendant Mandes in making delivery for him to his lunch rooms in the City of Washington, District of Columbia; that in operating and driving said automobile or gasoline vehicle over the streets, avenues, highways and by-paths in the City of Washington, District of Columbia as aforesaid, it became and was the duty of the defendant Mandes to employ a driver or operator of said automobile or gasoline vehicle who had a license to operate said automobile or gasoline vehicle in the City of Washington, District of Columbia, and to employ a driver or operator of said automobile who was reasonably skillful and competent to operate the same in the said City and District, but the defendant Mandes, disregarding the positive duty imposed upon him in that regard, and in violation of the police regulations of the District of Columbia, permitted and allowed the defendant Suraci to operate said automobile or gasoline vehicle without first having obtained a license from the District of Columbia to operate said automobile or gasoline vehicle in the District of Columbia, and without being properly taught or trained in
7 the art of operating said automobile or gasoline vehicle, all of which was known to the defendant Mandes, or by proper and

reasonable diligence and efforts on his part could have been known, and that by reason of said negligence of the defendant Mandes in these respects and by reason of the negligence of the defendant Suraci, driver, and by reason of the incompetency and unskilfulness of the driver of said automobile or gasoline vehicle in the several respects as aforesaid, which negligence defendant Mandes well knew, or should have known, the defendant, Suraci, driver of said automobile or gasoline vehicle owned by the said defendant Mandes, without warning or notice to the plaintiff suddenly ran into said plaintiff throwing him violently to the ground, and ran over him, causing many severe and permanent injuries to said plaintiff, to wit, severe and permanent injury to his skull, and fracture of the skull resulting in concussion of the brain and other injury to the brain and permanent injury to his head; his right ear drum was broken or injured, resulting in permanent deafness to the right ear; that both lungs of the said plaintiff were permanently and severely injured, that his back was sprained and otherwise seriously and permanently injury.

Plaintiff received a severe and permanent nervous shock, resulting in a permanent nervous condition, all of which said injuries have incapacitated the plaintiff in the pursuit of his calling, which was that of a collector, and the said injuries are of such a character as to prevent him from doing any similar work, or any work which requires the free use of his body and limbs, thereby causing a loss in salary to

the plaintiff of \$110 per month, which was the amount of
8 salary received by the plaintiff at the time of the injury.

Plaintiff expended large sums in doctors' bills and medicine in his efforts to be cured of his said injuries as aforesaid, amounting to a loss to the plaintiff in the sum of \$—.

By means of the premises the plaintiff was then and there greatly bruised, hurt and wounded, and became and was sick, sore, lame and disordered for a long space of time, to wit, hitherto, and will continue and remain in the future, all to the damage of the plaintiff in the sum of \$30,000.

Wherefore plaintiff brings this suit and claims of the said defendants the sum of \$30,000, besides the costs of this suit.

W. GWYNN GARDINER,
BLAINE COPPINGER,
HARRY W. BRIMER,
Attorneys for Plaintiff.

Plea of Defendant Mandes.

Filed December 27, 1916.

* * * * *

Now comes the defendant, Louis Mandes, by and through his attorneys and for a plea to the declaration filed in the above entitled cause

and to each count thereof, says he is not guilty in manner and form as therein alleged.

O. H. OSTERMAN.
E. F. COLLADAY.
SOTERIOS NICHOLSON.

Plea of Defendant Suraci.

Fled January 4, 1917.

* * * * *

9 Comes now the defendant John Suraci in the above entitled cause and for plea to the declaration and to each count thereof, says that he is not guilty in manner and form as therein alleged.

ALVIN L. NEWMYER,
Attorney for John Suraci.

Joinder of Issue.

Filed January 9, 1917.

* * * * *

The plaintiff joins issue on the pleas of the defendants, Louis Mandes and John Suraci to the declaration heretofore filed herein.

W. GWYNN GARDINER,
Attorney for Plaintiff.

Supreme Court of the District of Columbia.

Tuesday, December 10th, 1918.

Session resumed pursuant to adjournment, Hon. Wendell P. Stafford, Justice presiding.

* * * * *

Comes now Mr. A. L. Newmyer, and in open court suggests the death of the defendant John Suraci; whereupon it appearing that this action does not survive, it is ordered that as to said defendant this action stand abated.

Memorandum.

February 3, 1919.—Verdict for plaintiff for \$6,000.00.

Motion for New Trial.

Filed February 7, 1919.

* * * * *

10 Comes now the defendant, Louis Mandes, by his attorneys, E. F. Colladay and O. H. Osterman, and moves the court to set aside the verdict of the jury returned herein against said defendant in the sum of \$6,000.00 and to grant a new trial.

E. F. COLLADAY,
O. H. OSTERMAN,
Attorneys for Defendant Louis Mandes.

For grounds of the foregoing motion, said defendant states as follows:

1. The court erred in overruling defendant's motion to direct a verdict for defendant at the close of plaintiff's case.

2. The court erred in overruling defendant's motion to direct a verdict for defendant at the close of all the evidence in the case.

3. The court erred in refusing to charge the jury as requested in Defendant's Requested Instructions Nos. 1, 2, 5, and 9.

4. There is a fatal variance between the allegations contained in the declaration and the proof.

5. The verdict of the jury is contrary to the weight of the evidence.

6. The verdict of the jury is not supported by the evidence.

7. The verdict of the jury is contrary to the evidence.

8. Upon the whole evidence, the plaintiff is not entitled to recover against this defendant.

9. The said verdict is excessive in amount, as shown by the evidence.

10. Evidence relevant, competent, and material to the issue by and upon behalf of the defendant herein joined has been discovered since the trial had herein; and defendant's failure to know of the same before the trial was occasioned through no fault or lack of diligence upon the part of defendant or his counsel.

11. And for other reasons apparent upon the face of the record.

E. F. COLLADAY,
O. H. OSTERMAN,
Attorneys for Defendant Louis Mandes.

11 Edward S. Duvall, Esq., Attorney for Plaintiff, Woodward Building, Washington, D. C.:

Take notice that the foregoing Motion will be for hearing at 10:00 o'clock A. M., on Friday, February 14, 1919, or as soon thereafter as counsel can be heard.

E. F. COLLADAY,
O. H. OSTERMAN,
Attorneys for Defendant Louis Mandes.

Service of a copy of the foregoing Motion and Notice is hereby acknowledged this 7th day of February, A. D., 1919.

Attorney for Plaintiff.

Affidavit of E. F. Colladay.

Filed February 7, 1919.

* * * * *

DISTRICT OF COLUMBIA, ss:

E. F. Colladay, being first duly sworn, on oath says: That he is one of the attorneys of record for Louis Mandes, defendant in the above-entitled cause, and as such attorney used and exerted every effort to discover any and all evidence relating to and touching the merits of said cause, prior to the trial had herein; that notwithstanding such efforts and due diligence on affiant's part, he learned for the first time on February 5, 1919, at about noon of said day, of the facts concerning said cause within the knowledge of Victor K. Kissal and Samuel W. Russell, as the same are set forth in their affidavits filed herein; that affiant learned thereof, as aforesaid, through defendant Mandes who, as affiant is informed and believes, made the same

known to affiant as soon as he learned thereof himself; and,
12 with respect to the evidence referred to in the affidavit of O. H.

Osterman, Esq., as having been discovered to him by one of the attorneys for plaintiff herein, affiant says that he first learned thereof from said Osterman very shortly after the jury had been instructed and retired, at which time affiant was told by said Osterman of the communication to him by said attorney for plaintiff.

And affiant further says that the matters and facts referred to and set forth in the several affidavits herein filed in support of the Motion for New Trial are material, relevant, and competent evidence in behalf of the defendant, Louis Mandes, and ought to be considered in his behalf in a new trial of this cause; and that, therefore, the verdict of the jury returned herein against said defendant on the 3rd day of February, A. D., 1919, ought to be set aside and a new trial granted, to the end that such evidence may be so received and considered in defendant's behalf.

E. F. COLLADAY.

Subscribed and sworn to before me this 7th day of February, A. D., 1919.

[SEAL.]

HELENE B. TRIEBLER,
Notary Public, D. C.

Affidavit of O. H. Osterman.

* * * * *

DISTRICT OF COLUMBIA, ss:

O. H. Osterman, being first duly sworn, on oath says: That he is one of the attorneys for Louis Mandes, defendant in the above-entitled cause, and, as such attorney, has used and exerted every effort to discover any evidence touching upon the merits of said cause; that notwithstanding such efforts and due diligence upon his part, 13 he learned of the knowledge possessed by Victor K. Kissal and Samuel W. Russell concerning said cause and the issues thereof, for the first time about noon on the 5th day of February, 1919, when he (affiant) was informed thereof by his associate counsel, E. F. Colladay, who had just learned of the same through said defendant, Louis Mandes; and affiant further says that the facts stated in another affidavit filed herein by him, in support of the motion for new trial, first came to his knowledge at the time and in the manner stated in said affidavit; and that, because of the newly-discovered evidence mentioned and referred to herein, and in the other affidavits filed in support of defendant's motion for a new trial, affiant says the verdict of the jury herein ought to be set aside and a new trial granted.

O. H. OSTERMAN.

Subscribed and sworn to before me this 7th day of February, A. D., 1919.

[SEAL.]

HELENE B. TRIEBLER,
Notary Public, D. C.

Affidavit of Louis Mandes.

* * * * *

DISTRICT OF COLUMBIA, ss:

Louis Mandes, being first duly sworn, on oath says: That he is the identical person named as defendant in the above-entitled cause, and makes this affidavit in support of the motion filed herein for a new trial; that on Wednesday, February 5, 1919, in the forenoon, affiant had a conversation with one Samuel W. Russell, Manager of Charles H. Javins & Sons, wholesale and retail dealers in fish, oysters, and poultry, in this City, and was then informed by said Russell 14 that the latter had, on Tuesday, February 4, 1919, read in the newspapers an article stating that one Thomas O. Midgett had been awarded a verdict against affiant for personal injuries inflicted upon said Midgett by an automobile; that affiant thereupon stated to said Russell that the accident in question had occurred in September, 1916, when the automobile was being driven by One John Suraci; that immediately upon the mention of those facts by affiant,

said Russell stated that he recalled the happening of the accident as it had been related to him by said Suraci a few days after the happening thereof; and said Russell further informed affiant that said John Suraci had told him a few days after the happening of the accident that he, said Suraci, owned the automobile in question at the time of the accident; that he had bought the same from affiant a few days prior to the accident, and actually owned the same at said time, although formal papers of transfer had not at the time of the accident been executed.

Affiant further says that the foregoing facts as related to him by said Russell, and set forth in the affidavit of said Russell, also filed herein, came to the knowledge of affiant for the first time on said 5th day of February, 1919, notwithstanding affiant has used every effort and due diligence to discover every fact pertaining to and bearing upon the suit for damages against him by said Thomas O. Midgett.

And affiant further says that he has read the affidavit of one Victor K. Kissal, filed herein in support of affiant's motion for a new trial, and knows the contents thereof; that the knowledge of the facts stated therein by said Kissal with respect to the accident in which the plaintiff sustained his injuries sued for in this action, was unknown to affiant until the 5th day of February, 1919, when said Kissal made known to affiant his knowledge of said facts, in the course of a conversation with affiant regarding the verdict returned against affiant herein; and that affiant's failure to know of the possession of such knowledge and information by said Kissal was due to no neglect or lack of diligence on the part of affiant.

LOUIS MANDES.

Subscribed and sworn to before me this 6th day of February, A. D., 1919.

[SEAL.]

HELENE B. TRIEBLER,
Notary Public, D. C.

Affidavit of Samuel W. Russell.

* * * * *

DISTRICT OF COLUMBIA, *To wit:*

Samuel W. Russell, being first duly sworn on oath says:

That he is the manager of Charles H. Javins and Sons, wholesale and retail dealers in fish, oysters and poultry of this city; that he has been engaged in that business for twenty years, and in connection with his business became acquainted with and knew for several years one John Suraci who was the owner and proprietor of an oyster business at 435 R Street, N. W. this city; that on Tuesday February 4, 1919 this affiant read an article in the newspapers in which it was stated that one Thomas O. Midgett had been awarded a verdict against one Louis Mandes for personal injuries inflicted upon said Midgett by an automobile; that during the forenoon of February 5, this affiant, in the course of a conversation with said Louis Mandes,

16 made mention of the recovery of said verdict against said Mandes and was informed by said Mandes that the accident out of which the suit against him had grown had happened in September 1916; that the automobile inflicting the injuries upon said Midgett was at the time being driven by John Suraci; that immediately upon the mention of these facts by said Mandes affiant recalled the happening of the said accident as the same had been related to him by said John Suraci a few days thereafter; that affiant distinctly recalls the said John Suraci having told affiant a few days after the occurrence of said accident that he, Suraci, owned the automobile figuring in said accident at the time the accident occurred; that he had bought the same from said Louis Mandes a few days before the accident, and actually owned the same at the time of the accident although formal papers of transfer had not at the time of the accident been executed.

Affiant further says that he never informed said Louis Mandes of the aforesaid statement made to him by John Suraci until the morning of the present day, Wednesday, February 5, 1919.

SAMUEL W. RUSSELL.

Subscribed and sworn to before me this 5th day of February, A. D. 1919.

[SEAL.]

HELENE B. TRIEBLER,
Notary Public, D. C.

Affidavit of Victor K. Kissal.

* * * * *

DISTRICT OF COLUMBIA, ss:

Victor K. Kissal, being first duly sworn, on oath says: That on Monday or Tuesday of the present week, he learned that a verdict had been awarded against the defendant, Louis Mandes, for
17 personal injuries sustained by some person as a result of a collision with an automobile being operated by one John Suraci; that on yesterday, February 5, 1919, affiant had a conversation with the defendant, Louis Mandes, regarding said matter, and was informed by him that the collision in question occurred in September, 1916; that upon learning that fact, affiant immediately recalled having been told by said John Suraci (who was well known to affiant) just a day or two prior to the accident that he had bought the automobile from the defendant Louis Mandes, and that just a few days following the accident, said Suraci again talked to affiant and informed him that he had had an accident with the automobile which he had purchased from said Mandes, but that title papers for the same had not yet been signed by said Mandes and Suraci.

And affiant further says that yesterday, February 5, 1919, was the first time he ever discussed the matter of said accident with defendant Mandes, or ever mentioned the same to him in any way or manner; and that yesterday was the first time that said Mandes knew,

or had any cause to believe or suspect that affiant possessed any knowledge whatsoever concerning the facts hereinbefore set forth.

VICTOR K. KISSAL.

Subscribed and sworn to before me this 6th day of February, A. D., 1919.

[SEAL.]

HELENE B. TRIEBLER,
Notary Public, D. C.

Affidavit of O. H. Osterman.

* * * * *

DISTRICT OF COLUMBIA, *To wit:*

O. H. Osterman, being first duly sworn on oath says: That I am one of the attorneys of record for the defendant in the above entitled cause; that on Monday the 3rd day of February 1919 after the above entitled cause was given to the jury and the jury had retired to the jury room, and while there they had the case under consideration, I had occasion to speak with Mr. E. S. Duvall, Jr., attorney for plaintiff, in regard to his expectations of the verdict of the jury, and among other things I asked him what he thought the prospects were for his obtaining a verdict from the jury for \$10,000.00, which amount he had previously on other occasions stated that he expected to recover. In response to my inquiry Mr. Duvall stated that if he did not get \$10,000.00 he did not think the verdict would be less than \$7,500.00, and in answer to that statement of his I replied by saying that I hoped the plaintiff would get a proper verdict in the case, provided that there was any liability on Mandes' part, in so far as there was no defense so far as the actual occurrence was concerned, but that I was convinced that Mandes was not responsible, as a matter of fact. Mr. Duvall then stated to me that he knew that Mandes was responsible because he had a statement signed by Suraci, the alleged chauffeur in the case, in which he stated that after the morning trip from 314 Ninth Street to the place testified to by Mr. Mandes that Suraci had returned the machine in the afternoon, and that about four o'clock of the same day he went from 314 Ninth Street to 5th and G Streets, N. W. for the purpose of getting the empties that he had delivered in the morning. Mr. Duvall further stated that the statement in his possession signed by Suraci went further and said that at Fifth and G Streets, Suraci did not feel well and drove the car in question from there to 435 R Street to get some medicine and that when he left there he told one of his employes to go along with him and getting in the machine drove to Eleventh Street and Rhode Island Avenue, where the accident happened, for the purpose of getting some gasoline, and from there he intended to go to Fifteenth and G Streets, N. W., to pursue the business of Mandes.

O. H. OSTERMAN.

Subscribed and sworn to before me this 7th day of February A. D. 1919.

[SEAL.]

HELENE B. TRIEBLER,
Notary Public, D. C.

Notice.

Filed February 12, 1919.

* * * * *

Edward S. Duvall, Esq., attorney for plaintiff, Woodward Bldg.,
Washington, D. C.:

Take notice that an affidavit of one Henry Streb, signed and sworn to this day, a carbon copy of which is hereto attached, will be offered and read in support of the pending Motion for a New Trial in the above-entitled cause, when said Motion is heard on Friday, February 14, 1919, at 10:00 o'clock A. M., or as soon thereafter as counsel can be heard.

E. F. COLLADAY,
O. H. OSTERMAN,

Attorneys for Defendant, Louis Mandes.

Washington, D. C., February 10th, 1919.

Receipt of a copy of the foregoing Notice and affidavit therein referred to, on this 10th day of February, A. D. 1919, is hereby acknowledged.

EDWARD S. DUVALL,
Attorney for Plaintiff.

Affidavit of Henry Streb.

* * * * *

DISTRICT OF COLUMBIA, *To wit:*

Henry Streb, being first duly sworn, on oath says: That he was well acquainted with one John Suraci, who conducted an oyster business at 435 R Street, N. W. for several years prior to his death, which occurred a few months ago; that he remembers the happening of an accident in the fall of 1916 at the gasoline supply station of one Addison Smith located on the Northwest Corner of Eleventh Street and Rhode Island Avenue, Northwest, Washington, D. C., in which a Ford delivery automobile driven by John Suraci struck and injured a man; that affiant recalls having been told by said Suraci a few days before said accident that he "Suraci" had on that day bought a Ford automobile, and at Suraci's request affiant accompanied Suraci to the alley-way in the rear of the lunch-room of Louis Mandes on Ninth Street, Northwest, and there took charge of the same Ford automobile which figured a few days later in said accident, and drove it for Suraci to 435 R Street, N. W., and put it in

Suraci's garage at his direction; that at the time of the happening of the aforesaid accident, affiant was in the neighborhood of Suraci's oyster house and soon after the accident a boy came there and told affiant that Mr. Suraci had had an accident; that affiant went immediately to the place in question and as he approached 11th Street coming West on Rhode Island Avenue, he saw the Emergency Hospital ambulance pass from Rhode Island Avenue, around from Iowa Circle; that affiant met said Suraci very near the scene of the accident and took him in his own (affiant's) automobile to the Emergency Hospital, where they remained a short time and then returned to the place where the accident occurred; that upon his return to said place, affiant looked inside of the Ford delivery automobile, being the same one he had previously driven home for said Suraci, but did not see any pies or cakes in the same, or any trays such as are ordinarily used in delivering such products. There was only one shelf in it which was near the top and nearly the full width and length of the wagon. There were some automobile tires in the bottom of the car.

And affiant further says that he discussed the foregoing facts and matters with E. F. Colladay and H. S. Barger for the first time on Friday afternoon, February 7, 1919; which was the first time he ever mentioned the matter to any one representing the defendant Mandes.

HENRY A. STREB, JR.

22 Subscribed and sworn to before me this 10th day of February, A. D. 1919.
[SEAL.]

HELENE B. TRIEBLER,
Notary Public, D. C.

Affidavit of E. F. Colladay.

Filed February 14, 1919.

* * * * *

DISTRICT OF COLUMBIA, to wit:

E. F. Colladay, being first duly sworn, on oath says: That with respect to the affidavit of one Henry Streb, Jr., filed herein in support of the pending Motion for a New Trial, the failure to ascertain and learn of the knowledge of said Streb concerning the subject-matter of this action before the trial hereof was due to no neglect, default, or lack of diligence on affiant's part; that he never knew or heard of said Streb until after the trial of this cause, notwithstanding the exercise of due diligence by affiant to ascertain all facts pertaining to the accident giving rise to this suit.

E. F. COLLADAY,
Attorney of Record for Defendant, Louis Mandes.

Subscribed and sworn to before me this 13th day of February,
A. D. 1919.

[SEAL.]

HELENE B. TRIEBLER,
Notary Public, D. C.

23

Affidavit of O. H. Osterman.

Filed February 14, 1919.

* * * * *

DISTRICT OF COLUMBIA, *to wit:*

O. H. Osterman, being first duly sworn, on oath says: That with respect to the affidavit of one Henry Streb, Jr., filed in support of the pending motion for a new trial herein, the failure to ascertain and learn of the knowledge of said Streb concerning the subject-matter of this action before the trial hereof was due to no neglect, default, or lack of diligence on affiant's part; and that he never knew or heard of said Streb until after said trial, notwithstanding the exercise of due diligence by affiant to ascertain all facts pertaining to the accident giving rise to this suit.

O. H. OSTERMAN,
*Attorney of Record for
Defendant, Louis Mandes.*

Subscribed and sworn to before me this 14th day of February,
A. D., 1919.

[SEAL.]

E. P. WHEATLEY,
Notary Public, D. C.

Supreme Court of the District of Columbia.

Friday, February 14th, 1918.

Session resumed pursuant to adjournment, Hon. Wendell P. Stafford, Justice presiding.

* * * * *

Come now the parties hereto, by their respective attorneys of record and the motion for a new trial filed is argued and submitted to the Court, and being considered it is ordered that said motion be, and the same is hereby overruled, and judgment on verdict is ordered.

Wherefore it is considered that the plaintiff recover herein of
24 the defendant, the sum of Six Thousand Dollars (\$6000.00)
for his damages heretofore assessed, together with his costs
of suit to be taxed by the clerk and have execution thereof.

From the foregoing judgment, the defendant by his said attorneys, in open court, notes an appeal to the Court of Appeals; whereupon, the penalty of a bond to operate as a supersedeas is hereby fixed in

the sum of Eight Thousand Dollars (\$8000.00), or for costs, in the sum of One Hundred Dollars.

Memorandum.

February 20, 1919.—Supersedeas Bond approved and filed.

Assignment of Errors.

Filed March 8, 1919.

* * * * *

During the trial of the above-mentioned cause, the court erred as follows:

1. In overruling defendant's motion to direct a verdict for the defendant at the close of plaintiff's case in chief.
2. In overruling defendant's motion to direct a verdict for the defendant at the close of the whole case.
3. In refusing to grant defendant's requested instruction No. 1.
4. In refusing to grant defendant's requested instruction No. 2.
5. In refusing to grant defendant's requested instruction No. 5.
6. In refusing to grant defendant's requested instruction No. 9.
7. In overruling defendant's motion for a new trial.

E. F. COLLADAY,
O. H. OSTERMAN,

Attorneys for Defendant, Louis Mandes.

25. Service of a copy of the foregoing Assignment of Errors is acknowledged this 7th day of March, A. D., 1919.

EDWARD S. DUVALL,
Attorney for Plaintiff,

Per L. R. P.

Designation of Record.

Filed March 8, 1919.

* * * * *

The clerk of the court will include in the transcript of record on appeal in the above-entitled cause the following:

1. Declaration.
2. Plea of defendant Mandes.
3. Plea of defendant Suraci.
4. Joinders in issue.
5. Suggestion of death of defendant Suraci.
6. Verdict.
7. Motion for new trial and affidavits in support.
8. Judgment on verdict.

9. Memorandum of approval and filing of appeal bond.
10. Bill of exceptions.
11. Assignment of errors.
12. This designation.

E. F. COLLADAY,
O. H. OSTERMAN,
Attorneys for Defendant, Louis Mandes.

Service accepted March 7th, 1919.

EDWARD S. DUVALL,
Attorney for Plaintiff,
Per L. R. P.

26

Memoranda.

April 10, 1919.—Time within which to submit Bill of Exceptions extended to and including April 18, 1919.

April 17, 1919.—Time within which to submit Bill of Exceptions extended to and including April 25, 1919.

Supreme Court of the District of Columbia.

Monday, April 21st, 1919.

Session resumed pursuant to adjournment, Hon. Wendell P. Stafford, Justice, presiding.

* * * * *

Come now the parties hereto by their respective attorneys of record, and thereupon the defendant's attorneys submit to the Court the Bill of Exceptions taken at the trial of this cause, and pray that the same be signed and made of record nunc pro tunc, which is hereby accordingly done.

27

Supreme Court of the District of Columbia.

UNITED STATES OF AMERICA,
District of Columbia, ss:

I, John R. Young, Clerk of the Supreme Court of the District of Columbia, hereby certify the foregoing pages numbered from 1 to 26, both inclusive, to be a true and correct transcript of the record, according to directions of counsel herein filed, copy of which is made part of this transcript, in cause No. 59769 at Law, wherein Thomas O. Midgett is Plaintiff and Louis Mandes and John Suraci are Defendants, as the same remains upon the files and of record in said Court.

In testimony whereof, I hereunto subscribe my name and affix the seal of said Court, at the City of Washington, in said District, this 28th day of April, 1919.

[Seal Supreme Court of the District of Columbia.]

JOHN R. YOUNG, *Clerk*,
By W. E. WILLIAMS,
Assistant Clerk.

28 In the Supreme Court of the District of Columbia, Holding
Circuit Court.

At Law. No. 59769.

THOMAS O. MIDGETT, Plaintiff,

vs.

LOUIS MANDES, Defendant.

Bill of Exceptions.

Be it remembered, That on the trial of this cause before Mr. Justice Stafford, beginning on the 30th day of January, A. D. 1919, the plaintiff, to maintain the issues on his part joined, offered as a witness ADDISON W. SMITH, who testified substantially as follows: That on September 9, 1916, he was engaged in the coal and automobile accessory business, including gasoline, at the place where the accident in suit occurred; that there was an entrance to his place of business from the Eleventh Street side, the same being about 40-odd feet distant from the Eleventh Street curb-line; that said entrance was paved, and the gasoline pump (about 10 feet in height) stood just within the building line on the Eleventh Street side, with a driveway on each side of the pump which was about twelve feet wide between the pump and the door clearance; that the pump was thus situated so that they could drive on each side, either to the right or the left of the pump, and the machines got gasoline on either side of the pump; that there was an exit from the yard on the Rhode Island Avenue side, which was about 9 feet wide, and that was the only exit from the yard for machines; that he (witness) remembered the plaintiff being on one side of the pump, the further side from the office, getting gasoline in his motorcycle; that at the time of the accident witness happened to be turning away, and simply
29. heard a crash turned quickly and plaintiff had been hit; that he knew Suraci, the driver of the automobile causing the accident; witness had an employee there at the time named Johnson, who is now in the British Army; Johnson was in the yard when plaintiff was run over by Suraci, and got in front of the Ford machine, put his hand on the radiator and tried to stop it; there was another man with Suraci, and the minute the accident was over and the machine was pushed off the plaintiff the two men jumped off

and both hurried away, and that was the last witness saw of anybody but Suraci until that evening and he came back later that day, the late afternoon; that he had known Suraci for about two years prior to the accident, and had never seen him with a Ford machine before the accident; that he had seen Suraci operating some old heavy machine, and did not know the make; that Suraci was at that time engaged in the oyster business on R Street; that the Ford machine was taken away, he thinks, in the afternoon of the same day, but he does not know who took it away; that Midgett's motorcycle stayed in his place for at least a month, and he thinks the Police Department took it away. On cross-examination, witness testified that Suraci came back in the afternoon and took the Ford machine away, and witness talked with him; that witness has no recollection as to the time when the accident occurred, but imagines it was about 11:00 or 12:00 o'clock, the middle of the day; that Suraci had that other old heavy machine, and had been coming to witness' place quite a long time, thinks as much as a couple of years; that Suraci's place of business was a few blocks away from witness' place of business; that he got out of the office in time to see the way the machine was operated and what caused the accident, because the machine was still running; it had passed the pump and was going back toward the fence; that there were two men in the machine at the time of the accident, Suraci and another, did not know the other man; that he knows of Suraci's death; that Holmes kicked the coil box off and stopped the machine back near the fence; that Suraci frequently bought gasoline at witness' place, probably the only place that witness knows of. On redirect examination, witness stated that

30 Suraci tried to stop the machine by pressing down on the brake and the low-speed at the same time; that immediately after the accident Suraci and the man with him left witness' place of business, did not wait for the ambulance, and did not wait for witness to get plaintiff out from under the machine.

Thereupon, further to maintain the issues on his part joined, the plaintiff offered as a witness GEORGE W. JOHNSON, who testified that he is a chauffeur, and at the time of the accident in suit was employed by one Frank Page, a paper-hanger, and lived at 1526½ Eleventh Street, Northwest, close to the gasoline station of witness Smith, a couple of doors from there; that he remembers seeing the accident in question, but does not remember the date other than it was a couple of years ago; that he was standing on the curb of Eleventh Street, about 15 or 20 feet from Smith's gas pump, when the accident occurred; that he was standing on the curb talking to a boy friend, and just at the time an automobile came in there, and by the automobile coming so fast it kind of almost ran over him, and it attracted his attention, and by that time it went up in this place and struck the plaintiff; that he could not tell from what direction the machine came, because it attracted his attention by coming in there so fast; that he heard no horn blown; that the machine was a white painted machine with a cook or chef painted on it with a pie in one hand and a cake in another; that there were two men in the machine, both white men; that the machine was mov-

ing about twelve miles an hour when it came in the driveway to the gasoline station where the accident occurred, that is the way it attracted his attention, coming in there so fast, it came near running over him; that is the way it attracted his attention and caused him

31 to see the accident; that he walked up in the yard and a gentleman was there picking the man up; that he picked the motorcycle up out of the driveway after the man was sent to the hospital, so other machines could come in and get gas; that he did not quite get inside before the machine was stopped, somebody had stopped the machine after it had dragged the man; that witness saw in the automobile some pans, pie pans or cake pans; that there was a couple of pies in one pan; that he did not pay much attention to the other pans; that the pan the pies were in was on the lower shelf; that the *the* inside of the machine was arranged "kind of like shelves, a bakery wagon, pans on each shelf"; that the pans were square, long and square (indicating); asked how the pans were arranged in there, he said it had a place for the pans like they were arranged like in a bakery wagon; that pies and cakes was all he noticed in the machine; "a great deal of them, on the lower shelf was two pies," above it was cakes; that he could not say how many cakes; that pies and cakes was all he noticed in the machine, and the pans; the pies and cakes were in the pans; that he did not know either of the men in the machine; that he had seen the machine several times before, in that section, downtown, and different other places; had seen it several places. On cross-examination, witness said he couldn't say the several places, but had seen the machine almost all over town, but could not name any particular place; that the only particular places he had seen it was where it was getting gas, did not pay much attention to it; that he could not say he had ever seen it at Smith's place before getting gas, never paid that much attention to it before the accident; that he had seen the sign on it with the chef holding the pie and cake in his hands, and being a chauffeur himself the sign attracted his attention; that he had seen it all over town, sometimes in the downtown section, like Pennsylvania Ave., 10th & E Sts., and had seen it running uptown, thinks about 18th St. & Columbia Road, in that section; that he never paid enough attention to it to say whether he ever saw the machine stop;

32 that one of his boy friends was with him when the accident happened to the plaintiff; that witness is 24 years of age; that he does not remember the date of the accident, but that it was about two years ago; that he could not say how many cakes were in the upper shelf; that they were something on the order of a pound cake, "kind of layer cake," something like that, he don't know exactly what kind of cakes; that some of them were about eight inches wide and about four inches high; that some of them were round and some square; that he could not tell how many were in the machine; that he could not tell how many shelves were in the wagon; when told *told* that he had mentioned two, and asked whether there were more than two shelves, witness said, "I did not pay that much attention, whether there were more than two shelves"; that he was up in the yard where the accident happened when he saw the pies on the

shelves in the wagon; that he looked in at the front of the machine; that he stood up on the runway, the fender, and looked back in the machine; that he did not see any curtains there, or anything there in his way, nothing to prevent him from looking in; that he did not know whether a person sitting on the seat could have looked into the back of the machine as he did or not; that he stood on the fender and got up and looked back into the car and saw "it was shelves all the way in the car"; that he had to look across the seat; the seat was between him and the back of the machine; that the accident happened about four o'clock in the afternoon; he was just getting off from his work, his usual time of quitting being any time after four o'clock; he had finished work, put his employer's machine away, and walked from his place of business, 1538 or 1534—9th Street, to the scene of the accident; he was on his way home; that Mr. Page's garage was in the rear of store; that he had been talking to his boy friend about five or ten minutes before the accident happened.

33 Thereupon, further to maintain the issues on his part joined, the plaintiff offered as a witness DUKE LEO BELL, who testified that he is a chauffeur; that he worked for defendant Mandes about two years ago, as chauffeur, delivering bread and cakes around to his lunch-rooms with his car, Mandes had a Ford car; that it was a little white car with a baker on it, holding a pie in one hand and a cake in the other; that he worked for Mandes about three months, he thinks; that Mandes had no other delivery wagons; that was the only one he had while witness was with him; that Mandes' place of business was on 9th Street between D and Pennsylvania Avenue; that he was in the lunch-room business under the name of White Palace Lunch, and there is where he sent all his stuff out from; that witness' duty was to deliver around to Mandes' lunch-rooms, pies, on Pennsylvania Avenue, "different ones he had"; that witness was supposed to get to work at six, but he never got there before seven; that Mandes had this Ford when witness first went to work for him, and kept it at Steele's garage on 8th Street; that on going to work daily, he reported at the garage where the car was kept, on 8th St. between D and E Sts., took it first to the lunch-room on 9th Street, took it back in the alley, and then went upstairs, where the baker had the stuff ready to go out and serve the route; that first thing in the morning he put nothing but bread and rolls in the wagon; that he used to make his first stop on Pennsylvania Avenue where defendant now lives, near Twelfth Street, next to the Raleigh; that he then went from there to G St., between 14th and 15th; that he used to serve the Little Palace Lunch, at 12th and U Sts.; that he came down to 5th and G Sts., where Mandes used to have a lunch-room; that they were all White Palace Lunch except the one at 12th and U, which was called Little Palace; that he also used to "carry marketing"; that later in the day he made deliveries of other supplies, he would have to take bread again, and cakes, different kinds of cakes and pies; that it took him at
34 least an hour and a half or two to make the rounds of those

places; that until the machine was put up in the garage it was ordinarily kept in the alley back of the 9th St. place; that he used to have to back into this alley, because it was a blind one; that sometimes the baker and another man downstairs would help load the machine; that on the morning of September 9, 1916, defendant Mandes told witness to go upstairs about 10 o'clock; he had not been out in the car that morning; Mandes would not let witness go out that morning because of some difficulty between them, he did not go out in the car all that day; that he had not been out the previous day; that two days before he left Mandes' service, which was on September 9th, he just "made an ordinary trip for him"; that he did not go out at all on September 9th, just brought the machine that morning to the store and backed it in the alley; that it was not loaded then and he did not see any loading that morning; that he went upstairs afterwards and knows it was not loaded that morning; he never returned to work for Mandes after that morning; the deliveries he made were daily deliveries; he did not take gasoline for the car when going about the city unless he ran out, it being his custom to get it at the Steele garage on 8th St. where the car was kept, but if he ran out he got it anywhere. On cross-examination, witness testified that when he had said 12th and U he meant 14th & U; sometimes he did not go to 14th & U every day; that they stopped taking pies and he just served bread there; that about a week before he left Mandes' service, probably not that long, he stopped going to 14th & U; that he did not work on Thursday before the accident; he thinks he was there on Tuesday and hauled some things to Mandes' house on Pennsylvania Avenue; he is not sure whether it was Tuesday, but he did not take the bakery things on Tuesday of that week; he thinks the last time he took the bakery things was on Monday before the accident; that he saw Suraci with the car a week or so after he quit, and the car had a crab and an oyster in the man's hand painted on the side of the car instead
35 of the pie and cake; the lunch-room at 14th and U stopped getting pies from us, then they got bread and rolls; asked how long before he quit Mandes it was that he quit going to 14th & U, witness said: "It was not long, I went up there because I took rolls up there, because sometimes I only took three dozen, and Mr. Mandes would say it would not pay to go up there for three dozen"; he does not know exactly how long it was before he left Mandes that he stopped going to 14th & U; that he stopped and the 14th & U lunch-room started again; that he don't know whether they stopped altogether before he quit or not; that the period in which he did not go to 14th & U was not as much as two or three weeks; they stopped but not that long; that each day he delivered the pies on the second delivery, "just so I got them around in time for lunch"; that he would leave on the second delivery sometimes at 10 o'clock if the pies were done; he would get to work at 7 and make another trip at 10 o'clock, maybe 11 and sometimes 12, because the pies did not get done, but he had to get the pies around for lunch; he would then be through with his rounds; he would come back and help the chef get through so they could get out in the evening; and that was the

kind of work he did in the afternoon if Mandes did not want to send him any more.

36 Thereupon, further to maintain the issues on his part joined, THOMAS O. MIDGETT, the plaintiff, took the stand in his own behalf, and testified as follows: That he knows how he was hurt only by what he has been told; has no recollection at all about the accident and does not remember going into Smith's place to get gasoline; he has no recollection whatever about the matter, only from what people have told him, and if they had told him he had been hurt in front of his own house, or over in Georgetown or Anacostia, or somewhere else, he would not have known the difference; he only knows what they told him, that is all; he first learned he had been hurt in Emergency Hospital; he does not remember when that was; it seemed like a dream to him, most of it; asked if he had ever been able to recall any of the circumstances of going into Smith's place to get gasoline and being injured in any way, witness replied "No, sir, I do not"; people have discussed it with him and tried to make him remember, but he "don't know of anything"; he does not recall anything that occurred on that day at all. He also testified as to his bodily and mental pain and suffering; his good physical condition prior to the accident, and his permanent injuries caused by the accident, including deafness in one ear; his earning capacity prior to the accident; his reduced earning capacity since the accident and his inability to pursue his former vocation because of the injuries; he is now employed by the Federal Taxicab Company as a chauffeur, working about half time and not able to do the regular work of a chauffeur; that he made a written application to the Federal Taxicab Company, which was then shown to him by the cross-examiner, and which he identified as signed by him; that when he made the application he had trouble with the hearing of his right ear, the same trouble then that he described to the jury; that he had had it all the time since the accident, and still has it; at that time he had the trouble with his back and was then wearing a corset, like the one he wore when he testified; that at the time he made said application to the taxicab company he had all the sickness and infirmity he had described to the jury. On redirect examination the witness testified that the officials of the Federal Taxicab Company have known of his physical condition from the time he first went there; that they have made

some exception in his case on account of that; they have let
37 him go off, let him work practically whichever way he could work, and do not say anything to him if he is off so he cannot work for a week; he would like to work when he can work, and when he can work only two hours he works that long, and if he can work all day he works that long.

Thereupon, further to maintain the issues on his part joined, medical testimony was adduced tending to prove that plaintiff suffered a fracture of the skull at its base, with attendant hemorrhage; also a permanent injury to the inner, right, ear, resulting in deafness in

that ear; and an injury to his back; and that it is an incident and symptom of that head injury, his impaired memory and failure to recollect anything about the accident and the events immediately preceding, as testified.

38 Thereupon, further to maintain the issues upon his part joined, the plaintiff produced as a witness in his behalf Mrs. NORAH MIDGETT, his wife, who testified that not very long after the accident she learned of plaintiff being in the hospital and went there, and continued to go to the hospital until she took him home five weeks later; she does not know exactly the time of her visit to the hospital, but supposes it was about from five to six o'clock on Saturday afternoon of September 9, 1916; she testified to the bloody discharge from plaintiff's ear when she saw him; that he has never been able to recall how the accident happened; that he was a well man before the accident and since he has been sick all the while; that he has shown indications of physical suffering since he left the hospital, having awful attacks with his head; she cannot tell from his actions which side of his head appears to be affected; he doesn't hear at all in the right ear; his hearing before the accident was perfect; that he is unable to assist about the house, as he formerly did, he kept the fires.

During the course of witness' direct examination she testified that plaintiff did not seem to remember things since, like he did before the accident, and thereupon counsel for the defendant moved the court to strike out the testimony on the ground that there was no allegation in the declaration of loss of memory, which motion was by the court overruled and an exception allowed.

39 Thereupon, further to maintain the issues on his part joined, the plaintiff produced as a witness in his behalf JAMES THEODORE HOLMES, who testified that he recalled the accident at the gasoline station of witness Smith on a Saturday in 1916 involving a Ford Delivery wagon and a man who was getting gasoline; he was at the time employed by said Smith, and was serving plaintiff with gasoline; that plaintiff with a motorcycle and witness were standing by the gasoline tank, he on one side and Midgett on the opposite side, and witness was pumping plaintiff's gasoline, when Suraci who was driving the Ford automobile, came in and ran over the plaintiff. Whereupon, the following questions and answers occurred:

Q. What happened after that? A. Well, the man stopped the car and shoved it back off him, and dragged him out from underneath the car.

Q. How was the car stopped? A. I pulled the emergency brake up on it and cut the motor off.

Q. When did you do that? A. After the car ran back up on him again, he ran up on him and knocked him down and then reversed his machine a little bit and brought it back on him again. Then I pulled the emergency brake up and cut the engine off.

Q. Where did the machine stop, finally? A. Where did it stop finally?

Q. Yes. Where was it brought to a dead standstill; how far was it from the pump? A. Well, I don't reckon the rear end of the machine was over three or four feet from the pump.

Q. It went beyond the pump, the whole machine? A. Yes, sir.

Witness further testified that there were two men in the machine which ran over plaintiff; witness knew one of them, Suraci, and did not know the other very well; he first noticed the automobile as it came up the "alleyway, near about to the pump;" he did not notice what the men were doing at the time; the accident happened on the right hand side of the pump, where plaintiff was standing; witness does not know whether he would recognize the man who was with Suraci if he saw him or not; when plaintiff was struck he was knocked down and dragged with the machine a little way; he was knocked down backwards over his motorcycle; the motorcycle was carried along with him; he was dragged on his back and side, head first, in the direction the car was going; witness helped get Midgett out from under the machine; Johnson also helped get him up.

40 Thereupon, counsel for the defendant announced that he would admit ownership of the automobile by the defendant up to about noon of the day of the accident.

Thereupon, further to maintain the issues on his part joined, counsel for plaintiff offered and read in evidence the original agreement between the defendant Louis Mandes and John Suraci, dated the 11th day of September 1916, in words and figures as follows :

40½ This agreement, made in duplicate original, this 11th day of September, A. D. 1916 by and between Louis Mandes party of the first part and John Suraci, party of the second part, both of the City of Washington, District of Columbia,

Witnesseth that, whereas the said party of the first part has a Ford automobile for sale, manufacturer's #944902; and whereas he is in the lunch room business and as part of his selling food he purchases oysters for the accommodation of his customers and desires to purchase the same from the said party of the second part; and

Whereas the said party of the second part is in the oyster business and desires to purchase said Ford automobile from said party of the first part and desires also to furnish oysters to the said party of the first part at the place of business of said party of the first part to cover the purchase money for said Ford automobile, which is estimated to be in the sum of Four Hundred Dollars (\$400.00).

Now therefore in consideration of the sum of One Dollar (\$1) to each of the parties in hand paid by the other, the receipt whereof is hereby acknowledged, the said parties agree as follows:

1. The said party of the first part delivers said Ford automobile manufacturer's #944902 to the said party of the second part in con-

sideration that the said party of the second part should furnish to the said party of the first part oysters at his place of business 314 Ninth St., N. W., City, when and as he, the said party of the first part, requires until the sum of Four Hundred Dollars (\$400), same being purchase price of Ford Automobile, has been paid in full.

2. Said party of the second part agrees to deliver to said party of the first part oysters to his place of business 314 9th St., N. W., City, when and as he requires the same, until the full sum of
41 Four Hundred Dollars (\$400.00) is paid in full.

3. The title of said automobile shall remain in the party of the first part until the said party of the second part has delivered to said party of the first part Four Hundred Dollars (\$400.00) in oysters, as above mentioned.

In witness whereof the said parties have hereunto set their hands and seals the day and year first above written.

LOUIS MANDES. [SEAL.]
JOHN SURACI. [SEAL.]

Witnessed by:
SOTERIOS NICHOLSON.

DISTRICT OF COLUMBIA, *To wit:*

I, Soterios Nicholson, a Notary Public, in and for the District of Columbia, do hereby certify that Louis Mandes and John Suraci, parties to a certain conditional bill of sale, bearing date on the 11th day of September, A. D. 1916, and hereunto annexed, personally appeared before me in said District, the said Louis Mandes and John Suraci being personally well known to me as the persons who executed the said bill of sale and acknowledged the same to be their act and deed.

Given under my hand and seal this 11th day of September A. D. 1916.

[SEAL.]

SOTERIOS NICHOLSON,
Notary Public, D. C.

(Stamped by the Recorder of Deeds as delivered for recordation and recorded September 15, 1916, on the Land Records of the District of Columbia.)

42 Thereupon, further to maintain the issues on his part joined, plaintiff recalled the witness DUKE LEO BELL, who testified that the automobile delivery wagon of the defendant Mandes had a "big shelf on the top where you put cakes and stuff"; that there was a big tray in there, a big shelf like, where we put the cakes on top there, and underneath we put the pies, and we had regular boxes for the pies; he had tin trays for his cakes which were delivered with the supplies to the restaurants; if he delivered short-cake he would leave them; he would leave some and probably have some

to bring back. On cross-examination, witness testified they had regular boxes in the delivery wagon to carry the pies in, such as are used by the Connecticut Pie Company, with little shelves in them for pies, and you hold them at the top; there was only one large shelf in the delivery automobile; and that was up near the ceiling of the car; "it runs from the seat—I guess it was about—no it runs all the way to the back if I am not mistaken." "Q. You mean along the side of the wagon? A. No, sir, right clean across; the shelf where I put the trays taken the complete car." It was like another floor in the wagon, but was high up, and could be taken out. On redirect examination, witness testified that was the arrangement of the wagon on the day he delivered it to the lunch-room and never went back to work again that Saturday. On recross-examination, witness testified that he took the machine that Saturday from Steele's garage on 8th Street to Mandes' place of business on 9th Street and he never touch- it again that day; and that Mandes had no chauffeur other than witness while he was working there.

Thereupon, counsel for plaintiff introduced in evidence the Emergency Hospital records of plaintiff, counsel for defendant consenting; and said records showed that the plaintiff was brought to said Hospital in the ambulance; that he was admitted as a patient at 5:15 P. M. on September 9, 1916, and discharged October 14, 1916.

43 Thereupon, counsel announced the close of plaintiff's case in chief; and

Thereupon, counsel for the defendant moved the court to direct a verdict for the defendant, on the grounds that there was not sufficient evidence to take the case to the jury on the question of the control of the machine at the time of the accident by the defendant Mandes, or the ownership at the time of the accident; that there was nothing in the evidence to show that the man who operated the machine, a former defendant, deceased at the time of trial, clearly liable if *her* were living, was in the employ of Mandes, and there was no evidence to show that the machine was then in the business of the defendant Mandes; also that there was no evidence to show that there was any authorization on the part of the defendant Mandes, or the man who was operating the machine at the time of the accident, formerly a defendant also, was operating it in behalf of the defendant Mandes, or at a place with his knowledge or consent or authorization; and that there was a complete failure of evidence to connect the defendant Mandes with the *oenwreship*, control, and operation of the car; which motion was by the court, after argument, overruled, to which action of the court in overruling said motion counsel for the defendant asked an exception which was then and there entered upon the minutes of the court.

Thereupon, to maintain the issues on his part joined, the defendant, LOUIS MANDES, took the stand in his own behalf and testified as follows: That he had been engaged in the lunch-room business in

Washington for nineteen years; that in September, 1916, he had three lunch-rooms, located at 314 9th St., N. W., 1113 Pennsylvania Avenue, N. W., and 1417 G. St., Northwest; his nephew at that time had a Lunch-room at 14th and U Streets, N. W.; he had a bakery at his 9th street establishment, and at the time of
44 the accident had been operating it about a year and a half or two years; from that bakery he supplied his own lunch-rooms, and up to a time between the 1st and 5th of July of that year had also supplied his cousin's place at 14th & U; that he also supplied a lunchroom at 5th & G. Sts. N. W., but it had been closed down, it was closed up, at the time of the accident, he was not sure how long before it had been closed, because he had sold it and had to close that up, sold it to somebody else and had to close it up; outside of the places mentioned he supplied no one else with bakery goods at any time; he stopped delivering to his nephew's place at 14th & U Sts. sometime between the 1st and 5th of July; he delivered nothing to him after that; at the time of the accident he was delivering only to his own places, three. Asked what time of day he usually sent out the bakery goods from the 9th St. place, witness replied: "At that time, that day exactly, he took the stuff by 9:30;" Suraci took the stuff; that he used in his business a Ford automobile delivery wagon which he thinks he had had between 8 and 10 months before the accident occurred; that the witness Duke Leo Bell was the driver of the car before Suraci drove it; he believes the last time Bell drove the car was on Friday; on that day he sent Bell three places; Suraci drove the car on Monday before the accident; Suraci drove it on Monday and Saturday the week of the accident; that he had a talk with Suraci about what he had done with the automobile; he never hired Suraci to work for him; he never told Suraci on Monday what to do with the machine.

Q. Did you make any agreement with Mr. Suraci about disposing of this machine? Just answer yes or no.

The Court: On what date?

The Witness: Yes.

By Mr. Colladay:

Q. On what day was this? A. On Thursday.

Q. What was that agreement?

By Mr. Duvall: I object, if Your Honor please.

Mr. Colladay: I will first ask, Thursday of what week, so as to get the time fixed.

Mr. Colladay:

45 Q. What Thursday was that? A. That Thursday, between Thursday and Saturday that thing happened.

Q. You mean it was Thursday just before the Saturday when the accident happened? A. Yes, sir.

Q. Now, what was the arrangement that you made with Mr. Suraci?

By Mr. Duvall: I object.

The Court: It may be received under objection.

Mr. Colladay:

Q. You may state. A. There was an arrangement to sell him the machine if he wanted to buy it, and John say, "I will to buy the machine, but I ain't got no money." I told John, "I buy oysters and you get the machine," and John he says, "I take the machine." I say, "John, when take it?" He said, "I take it Saturday or Monday." John came back and delivered the pies and took the machine. That is all I know of it.

Q. What day did he come back and deliver the pies and take the machine? A. On Saturday.

Witness further testified that Suraci left with the pies by 9:30 A. M., and witness saw him no more that day; that he saw him the following (Sunday) morning at 10 o'clock; that he first learned of the accident from Suraci and his lawyer and his brother; they came outside; he was inside his 9th St. lunch-room; that they told him about the accident outside the lunch-room; that on Saturday witness told Suraci "to deliver the pies at 1113 Pennsylvania Ave. and 1417 G St., and if he wanted the machine, to keep him, if not, bring him back. He took it and never bring it back"; that Suraci never delivered witness' bakery goods on Thursday and Friday; that when he talked with Suraci on Thursday about the machine they were outside in the street, outside of witness' 9th Street place; he had bought oysters from Suraci before the accident and for over a year; that he bought for all three of his places, used to buy all separate; and that he did not remember how long before the accident the 5th and G street place was closed; don't remember whether it was only a few days, "the place over there was sold and have to close it. Somebody else got it;" don't remember how long before the accident he sold it. On cross-examination witness testified that he bought the automobile from the Record Auto & Supply Co., and had the body painted by them, with a picture of a chef on it, and paid something like \$530 for it; that he does not remember when

46 the car was bought; that he suddenly decided to sell the machine in September, 1916; that he was thinking of selling his bake-shop; asked how he was to supply his places, witness said "I was thinking of closing up because my business never paid me;" he still has the Pennsylvania Avenue and G Street places; that he supplies them by buying and is not sending anything to them from the 9th street place; that he stopped sending supplies to G Street and Pennsylvania Avenue places "exactly the day I sold the automobile;" asked how he gets his supplies from the market to his 9th street lunch-room, witness said, "Of course, I buy them and they deliver them. Everything is delivered;" that he had not used that machine in trips to the market; asked if Duke Bell did

not go down to the market for him in it, witness said "No, sir. Sometimes Bell and I would go and get some things in a hurry, that is all;" that he had known Suraci for some three years; asked if Suraci was a man of means, witness said, "He was a good fellow. That is all I know;" asked if Suraci owned a business here, witness replied, "I don't know anything about his business;" asked if he did not know that Suraci was able to buy this machine for cash, witness replied, "I don't know that he was able, but he told me he ain't got no money to pay, but I know he was a good fellow, and I was thinking of getting my oysters from him, and I sold it"; asked if he ever parted with title to this machine when he gave it to Suraci, witness answered "No;" that he remembers signing some paper in his lawyer's office the Monday after the accident, in connection with that machine; that he happened to ask Suraci to drive this machine for him on Monday because "at that time I was short of help, something like, that boy, I believe, never worked at that time;" asked how he got hold of Suraci that day, witness said "He came every day, used to leave oysters in my place sometime between 9 and 10 o'clock. On Saturday he was late;" that on this particular Saturday he had some trouble with Bell; that Suraci came to his place at 9:30
47 that Saturday to leave oysters and he did not tell Suraci the boy was upstairs waiting, "did not tell him nothing. Only I told him to help me out for my pies;" that he did not tell him the boy was upstairs waiting, that he did not have anybody to deliver these pies; did not tell him the boy was waiting for some parties; "I asked him to help me out, to take the deliveries to three places, and he was willing;" that he took Suraci outside where the wagon was and helped him load it; the wagon was then standing in the alley; asked if he did not put in pies, pastries and bread, witness said "No bread;" asked if he put cakes in there, he said, "Bread, I don't know—we put cakes and all that stuff;" that they were on trays like the Connecticut Pie Company and Holmes; no tin trays at all, only wood trays. Thereupon the following questions and answers occurred:

Q. What became of those trays on these deliveries? Were they left at the places? A. Left them at the places.

Q. Then how were they obtained afterwards? Did not the wagon go back after that to get the empties? A. No, he never went back.

Q. I am not asking you about him. I am asking you if it was not the usual course of your business to go around afterwards and collect these trays. A. Not at that time.

Q. Not at that time, but was not that the usual course of the business for that wagon? A. Not at that time.

Q. Did not Bell use to do that? A. Bell used to do that. You want to know what Bell done?

Q. No. I am asking you, and you have already stated that is what he did, that after making deliveries he went around afterwards. A. Not all the time.

48 Q. How were the empty trays that were delivered on this Saturday gotten back to your place? A. I took them myself. I went over there and brought them back.

Q. Then they had to be brought back on Saturday, did they not?
A. No.

Q. Why did you go after them? A. Because I wanted to sell them. I sold the Connecticut Pie Company everything I had.

Q. Then they should have been delivered back to your place?
A. No. He was busy, and did not have time to bring them back.

Q. I asked you if it was not intended that those trays should come back to your place on that Saturday afternoon? A. No, sir.

Q. You went for them yourself, did you? A. I went and got them.

Q. When did you go and get them? A. After three weeks.

Witness then testified that before that Bell used to take the stuff and get the empties and bring them back; and thereupon the following questions and answers ensued:

Q. And you waited three weeks to get these empties? A. Not waited. I hired a man—I never hired a man, I told him if he was so kind to take my pies over there, of course he took the pies and left the boxes.

Q. Then you had to go after them? A. Yes, sir.

Q. And the accident happened in the meantime? A. I did not know anything about what happened to the accident.

Q. You did know that. You stated you were told Sunday morning. A. No. I know Sunday morning at 10 o'clock.

Q. When did you go after those trays? A. After three weeks.

49 Q. Three weeks after the accident? A. Yes.

Asked if he hired a man to go over there with him, witness said, "No, I never hired exactly the man, but I have bread people over there delivering me bread, and I told him if he was so kind to bring me my boxes back, and he was so kind and bring them back"; and thereupon the following question and answer ensued:

Q. Was that what you did that Saturday, ask him if he would be so kind to make those deliveries for you? A. At that time, yes.

Witness further testified that he was in his place of business on the afternoon of Saturday, September 9, the day Suraci took this machine out; and thereupon the following ensued:

Q. What time were you there? A. I was on time, 7 o'clock, and I went back and came back at 8 o'clock, and stayed on then until everything was delivered.

Q. Were you there any time between noon and 7 o'clock in the afternoon, between 12 o'clock, the middle of the day, and 7 o'clock? Were you at your place? A. I was over there all day. Maybe I went out and came back.

Q. You were in and out all the afternoon? A. Yes.

Q. Did you not see this wagon about 4 o'clock in the alley back of your place? A. No, sir.

Q. Did you go in the alley back of your place? A. No, sir. I went back in the alley, yes, sir.

Q. Did you not see this wagon standing there? A. No, sir.

50 Q. As a matter of fact, did not Suraci bring this wagon back there before 4 o'clock? A. He never bring it back.

Q. That wagon was not taken away from your place at 4 o'clock that afternoon to go and collect these empties? A. No, sir.

Q. Did you see Suraci after 9:30 o'clock in the morning? A. I never seen him again except Sunday.

Witness further testified that he employed 25 or 30 people there on the first floor, waiters and others; and thereupon the following question and answer occurred:

Q. And some of them were in the rear of your place, on the alley? A. There is not anybody working back there.

Asked if he had ever given Suraci a bill of sale for that machine, witness said, "I don't know if you call it a bill of sale, but I know I been signing a paper"; that he was speaking of the paper with Mr. Colladay; that he read the paper; that he went to Mr. Colladay's office about 10 o'clock on Monday and signed the paper; don't remember when he was told to come and sign it; asked how he happened to go there, witness said "at the time I sold the car, we told Mr. Nicholson to fix the paper and Mr. Nicholson fixed it, and we went in and signed it"; and thereupon the following questions and answers occurred:

Q. You said Suraci came there Sunday morning and told you what to do? A. Yes, sir.

Q. He did not say anything about telling you to come there and telling you [he would] to take the car? A. He had the car already.

Q. You did not testify to that on direct examination, that he came there and said that he would take the car? A. He had the car on Saturday. He did not bring the car back.

Q. How and when was it arranged for you and Mr. Suraci to execute this paper on Monday at 10 o'clock? A. It was arranged on Thursday. We telephoned to Mr. Nicholson to fix the paper and everything.

Q. Did you not just testify that on Saturday you told him that if he wanted the car to take it, and if he did not, bring it back? A. Exactly, but we have the three times, on Monday, Thursday and Saturday.

Q. And on Saturday you were undecided—he was undecided? A. No, on Thursday he decided. I said, "John, when are you going to take the car?" He said, "Monday—Saturday or Monday," and he came down and took the car Saturday and never came back.

At this point the court recessed, and upon reconvening, the following occurred:

Cross-examination continued:

Q. Did Mr. Suraci have a telephone at his place of business. A. I want to correct something at 5th and G. You asked me a little while ago——

Q. I asked you something about 5th and G? A. Yes, sir; a little while ago.

Q. What was it? A. I told you the place was sold.

Q. I did not ask you anything about 5th and G. A. Not now, but a little while ago.

Q. You mean a question that your counsel put? A. It is a place I rent and never sold. I thought you asked me if I sold it.

Q. I did not ask you anything about it. A. A little while ago.

Mr. Colladay: I asked him about that.

The Witness: Mr. Colladay did.

Mr. Duvall:

52 Q. What is it you wish to add or correct? A. I never sold the place at that time; I rented it to somebody. I want to say that.

Q. You did what? A. I never sold the place. Somebody asked me if I sold the place at 5th and G.

Q. What did you do? A. I rented it to somebody.

Q. Now, answer that first question I put to you? Read it, please, Mr. Stenographer.

(The stenographer read as follows:)

“Q. Did Mr. Suraci have a telephone at his place of business?”
A. I don't know. On his bill it is, but I never was connected with his telephone at all.

Witness further testified that he had seen that big machine Suraci had; Suraci made his oyster deliveries in that machine; that he never made any purchases on account of the machine which figured in this accident after September 11, 1916; he never purchased anything from the Record Auto Supply Co. after that date; does not know anything about a purchase amounting to 60¢ from the Record Auto Supply Co. on September 30, 1916; on September 30, 1916, the machine had been sold; it might have been an old bill before, someway, at the time he had it; did not know anything about making a payment of 60¢ to that concern on November 10, 1916; asked what Suraci did with his own machine the morning he made his delivery to witness and took witness' machine out, he replied: “I don't know anything about it”; did not know the man who was in the machine with Suraci, had never seen him before; asked whether he had seen him from that day to the time of testifying, witness replied, “Not that day neither, the one I seen was Suraci”; he “had never seen him at all, the man inside the machine.”

53 Thereupon the following questions and answers occurred:

Q. What was it that suggested to you that you had made a mistake about your testimony with regard to 5th and G? A. Somebody asked me a little while ago if I had sold the place.

Q. What suggested that you had made an error? A. Well, I never sold the place. I rented it to somebody.

Q. What suggested the error to you? A. How did I come to make the mistake?

Q. What suggested to you that you had made a mistake in your testimony? A. Well, because I say at that time I sold it.

Q. I know you said that. A. I never sold it. I rented it to somebody.

Q. Now you correct it to say you rented it. What suggested to you since you said you sold it that that was a mistake? A. I can't understand that, what you mean.

Q. What caused you to make this explanation? A. After I left around here I found out I made a mistake.

Q. How did you find it out? A. I was thinking.

Q. That is all? A. That is all.

On redirect examination, witness testified that after he rented the 5th and G place the person he rented to started buying from the Connecticut Pie Co.; that it was Duke Bell that delivered the bakery stuff all the week before the accident, from Monday to Saturday; asked if he heard Bell testify that he worked for Mr. Horning one or two days, and whether he was away from witness' employment one or two days, the witness replied, "He was away for awhile
54 and came back, he came back"; he didn't remember whether it was the same week or some other week; the bill of sale, the paper he testified about, he made it in Mr. Nicholson's office; Nicholson's office and Colladay's were both together, one office; Nicholson made it for him; Mr. Nicholson was associated with Mr. Colladay; Nicholson transacted this business; did that as his attorney. On recross-examination, witness testified that Nicholson's office was in the same suite with Colladay's; that he does not remember whether Suraci was there when he got there, he does not remember whether Suraci was there with him when he signed that paper; does not know that; that Nicholson witnessed the signatures of both; that fact does not refresh his recollection; that after that date he kept an account of oysters furnished and delivered by Suraci; asked in what form the account was kept, witness replied: "When he used to deliver so much stuff every day and I used to keep his bills, and he used to send me a statement every month until the time came to \$400, and I would pay him every day"; that the oyster season ends sometime when it is getting hot, "when it is getting hot that is all over"; that Suraci delivered \$400 worth of oysters to him that winter; that he does not recall ever having given him an absolute bill of sale, only the paper he testified about.

Thereupon, further to maintain the issues on his part joined, the defendant produced as a witness LOUIS CHACONAS, who testified that he is in business at 2001—14th St., at 14th and U Streets, N. W., the place is named Little Palace Lunch-room; that he has been in business there about five years; that he has a partner, John Mandes; he thinks John Mandes is a cousin of the defendant; that they formerly got their bakery supplies from defendant's bakery; they do not do so now; asked when they "quit," witness replied "The last payment I made by check was July 11, 1916"; that they did not get anything from defendant after that.

55 On cross-examination, witness testified that he recalled the date by his check-book and had no recollection other than

what the check-book gives; that he looked up his check-book; the check-book was not produced in court, and counsel for plaintiff having moved to strike out the witness' testimony, subsequently withdrew his motion.

Thereupon, further to maintain the issues on his part joined, the defendant produced as a witness in his behalf CARL EDWIN THOMPSON, who testified that in September, 1916, he was employed by John Suraci at 435 R St., N. W.; that he hauled oysters from the wharf; that he went to work for Suraci about a year before this accident occurred; that Suraci had two wagons; that he worked on Suraci's farm at Beltsville, Md., in the summer; that he was 19 years old at the time of testifying; that he had no certain hours of work; that in September, 1916, Suraci had a Stoddard-Dayton roadster which he used in hauling some, delivering some oysters; that he remembers the accident, but not the date; he was present when the accident occurred; he was in the machine; that he got into the machine at 435 R St., N. W., just a few minutes before; couldn't just tell what time of the day it was, it was in the afternoon; it was getting on towards evening; that Suraci drove up in front of the place, just asked witness to get into the machine and go along with him; that witness was right in front of Suraci's place, 435 R St. at the time, and Suraci was still in the machine; the machine was right in front of 435 R St.; Suraci drove the machine up; that witness got in, they went out R Street to Rhode Island Avenue, from Rhode Island Avenue to 11th Street and then to the place where the accident happened; that 435 R Street was Suraci's oyster house; that witness' day's work was not done when Suraci asked him to go with

56 him, as testified; asked to describe the accident, witness said, "Well, I hardly know how it is. I remember that Suraci drove up in front of that place. Just before he drove in, he stopped, and this man (indicating the plaintiff) was standing with the motorcycle right at the tank, and as he (meaning Suraci) was driving in it seemed his machine did not come out of gear, so it struck him (meaning plaintiff); that it knocked the man down and pushed him along the ground a short ways, he could not say how far; that he does not know how the automobile was stopped; that witness was sitting on the right-hand side of the machine and Suraci on the left-hand side; asked what happened after the accident, witness replied, "Well, after the accident they called an ambulance"; Q. What did Mr. Suraci do and what did you do? A. Well, I stayed there, and I don't know where he went"; that witness stayed there about half an hour, maybe a little longer; that he was there when the injured man was sent to the hospital; asked to describe the interior of the automobile that he was in, back of the seat, witness said, "Well, I couldn't see what was back of the seat, on account that there was a curtain across," a canvas or rubber curtain, he don't know which; it went to the top and filled up the space between the seat and the top of cover of automobile. On cross-examination, witness testified that he does not know defendant Mandes, having only seen him at his place of business where witness delivered after the

accident; that he never talked with Mandes from the time of the accident until the time of testifying; has never come in contact with him at all; that the curtain mentioned by him in direct examination was not one that rolled up or lifted up, but was one that slides on a wire; that it could be opened from the seat and when that was done there was nothing to prevent one from seeing the inside, nothing to prevent one from getting anything out of the car; that he does not know how many people were around at the time of the accident, in that yard; he did not notice; he knows there were a few around but don't know how many; does not remember whether there was any other vehicle in there besides the motorcycle when they drove in; that they went up on the right-hand side; that Suraci was operating the machine, not witness; and thereupon the following questions and answers occurred:

Q. You saw this man and his motorcycle there? You saw the man filling the motorcycle from the pump, the colored man? A. He was not filling it just at that time.

Q. They were both standing at the pump in plain view? A. Yes, sir.

Witness further testified that he attributed the accident to the fact that the machine did not come out of gear when Suraci tried to stop, that is the way it seemed to witness, he does not know; before Suraci struck the man, he made a stop with the automobile and started to go up in "low"; that was right on the pavement and then he attempted to go into "low" and there was not any stop between that and the collision with the man; that witness knows now how to run a Ford, did not know then; that Suraci's failure to throw the machine out of gear was caused by his (Suraci) getting excited, for all witness knows; that he was not watching what Suraci was doing, "I was watching the man in front of us"; and thereupon the following questions and answers occurred:

Q. When did you see Mr. Suraci next after he disappeared? A. I guess about an hour and a half after. He came to 435 R Street then.

Q. You next saw him at 435 R Street? A. Yes, sir.

58 Q. You next saw him at 435 R, an hour and a half afterwards? A. Yes, sir.

Q. How long did he remain there? A. I don't know. Some officers came there and got him.

Q. How long was Mr. Suraci away from his place of business just prior to his return, when he asked you to get in? A. I don't know. I had been to the wharf.

Witness further testified that he had gone to the wharf right after eating his lunch on the day of the accident; that he does not remember whether Suraci was there when he left or not; "I left Suraci in the back and got into his machine in front;" that he did not see Suraci at all between lunch time and when he drove up late

in the evening and asked witness to get in; that witness was not there that morning when Suraci made his oyster deliveries; that witness had gone to the wharf before Suraci left that morning; a woman named Schuler, who was with Suraci when witness was there, is now running Suraci's business; it has been over a year since he left Suraci, and Suraci has died since he left.

On redirect examination, witness testified that he never drove this Ford machine after the accident.

Thereupon, further to maintain the issues on his part joined, the defendant produced as a witness in his behalf SOTERIOS NICHOLSON, who testified that he is a Captain in the Army and a member of the bar of this Court; that he has been associated with E. F. Colladay in the practice of law; that he remembers the occurrence of
59 this accident; that he prepared the agreement between Mandes and Suraci and the same was signed by him in his presence, but at different times; that he, as a notary public, also took their acknowledgments; that he had a communication from Mandes prior to making the paper; and thereupon, over objection by counsel for plaintiff, witness was interrogated and testified as follows concerning said paper: that three or four days before the paper was signed, witness was down at Mandes' place to eat and had a conversation with him; that at the time the paper was signed witness had heard there had been an accident involving this automobile; that he never had any talk with Suraci about the matters contained in this paper before the day it was signed, but did on the day it was signed, did not see him before; was told by Mandes about four days prior, at the lunch-room, to prepare it; witness then said, "I was busy, I did not have time to prepare it; and that day it was signed, that day it was ready for both of them to sign—I believe, now, that I recollect that I saw Mr. Suraci also at Mandes' place regarding the bill of sale there;" that was about the time Mr. Mandes spoke to him about it; that he received instructions from both of them regarding the paper. On cross-examination witness testified that he was one of the counsel for defendant Mandes when this suit was filed; that he signed the defendant's plea as such; that he has never withdrawn his appearance; that he has known Mandes several years, knew him when witness was a student at George Washington University; that defendant was his personal client and engaged him first to defend this suit; that he and Mr. Colladay had joint offices at that time, in Mr. Colladay's suite; that they did not consider that paper together before it was executed; that both Mandes and Suraci acknowledged that paper before him on the same day.

60 Thereupon counsel for defendant recalled the plaintiff and asked if he could give the date when he made or signed the application to the Federal Taxicab Company and he said that he could not, there was no date on it and he did not recall it; he has been working there since October, 1917; he does not know whether the application was filled out at the time when he applied for his present position or not; he has been there several different times; that he

don't remember making out a paper and handing it to them when he applied for his position. Thereupon the said application, signed by the witness, was introduced in evidence by counsel for defendant and read to the jury, and among other questions and answers, contained the following:

"State what family you have, or what persons are dependent on you for support, and where they are. A. Wife and 2 children, at 1538 9th St., N. W."

"Are you subject to any sickness or infirmity? A. No."

"Have you any defect whatever in sight, hearing or speech? A. No."

"Have you ever driven a Taxicab? A. No."

"Last occupation. A. Chauffe-r."

"Where employed and by whom? A. Myself."

And thereupon the witness was asked the following question by counsel for defendant and made the following answer:

Q. I would like to ask Mr. Midgett one more question. Had you ever worked as a chauffe-r before you worked for the Federal Taxicab Company? A. I have never employed anywhere as a chauffe-r with no one. All I have ever driven a car was driving it for myself. I filled that out before Mr. Whalen who was the gentleman in charge, who was manager. I called his attention to that, and he said, "Midgett, this is just a matter of form; that is all. You don't have to go before a Notary Public, or anything." Mr. Whalen knew my circumstances, and I told him at the time—I said, "Mr. Whalen, I will be able to work two or three days a week, and maybe not that much." He says, "That is a matter of form; that is all."

And thereafter, and after this witness' examination had been concluded and the taking of testimony on both sides announced as closed, the proceedings were adjourned until the next trial
61 day. When the session of the court was resumed to consider the case, and before the submission of prayers by counsel for the parties, the following occurred:

"Mr. Duvall: I wish to make application to reopen the case for the purpose of producing a witness from the Federal Taxicab Company to explain the making of this application which Mr. Midgett, your Honor will recall, on cross-examination said that suggestions were made to him, or that he made the application under the guidance of one of the men in the office of the Federal Taxicab Company, and that they understood his condition. The offer is merely for the purpose of corroborating him in what he testified to on cross-examination in that regard. The witness was not available, and I knew nothing about it until that matter was drawn out on cross-examination late Friday.

"The Court: I think we will not reopen it."

62 Thereupon, the court announced to counsel, at the bench, that as the testimony concerning the impairment of plaintiff's memory was admitted as evidence only of symptoms of the injury

claimed, he would charge the jury that there could be no recovery for loss of memory, in any event, there being no claim of incapacity in the declaration in respect of loss of memory; to which counsel for plaintiff and defendant did not object.

Thereupon, counsel for the defendant moved the court, upon the whole evidence, to direct a verdict for the defendant, which motion was by the court overruled, to which action of the court in overruling said motion counsel for the defendant asked an exception, which exception was then and there allowed and duly entered upon the minutes of the court.

Thereupon, counsel for the defendant requested the court to instruct the jury as follows:

1.

The jury is instructed on all the evidence that their verdict must be for the defendant.

(Refused & exception.)

2.

The jury is instructed on all the evidence that John Suraci was not at the time of the accident a servant or agent of the defendant, so as to make the defendant liable for the acts of the said John Suraci, even if they were negligent, and caused the injury to the plaintiff.

(Refused & exception.)

3.

(Prayer No. 3 withdrawn.)

4.

The jury is instructed that if they believe from the evidence that at the time of the accident John Suraci was not driving the Ford automobile in question in the business of the defendant Mandes, then the defendant Mandes is not liable for the acts of Suraci even if they were negligent and caused the injury to the plaintiff, and their verdict must be for the defendant.

(Granted & exception.)

5.

The jury is instructed that if they believe from the evidence that the defendant Mandes and John Suraci prior to the time of the accident had agreed upon a sale of the automobile in question by Mandes to Suraci, and Mandes authorized Suraci to take and keep the automobile on the day of the accident, and Suraci did so take the automobile, and put it in use in his own business before the accident, then the defendant is not liable for the acts of Suraci even if
63 they were negligent and caused the injury to the plaintiff,
and their verdict must be for the defendant.

(Refused & exception.)

6.

(Prayer No. 6 withdrawn.)

7.

The court instructs the jury that in this case the affirmative of the issues is upon the plaintiff to prove the material allegations of his declaration.

(Granted & exception.)

8.

The jury are instructed that the burden is upon the plaintiff to establish his case by a fair preponderance of the evidence; that is, by such evidence as, when weighed with that which opposes it, will have more convincing force, and from which it results that the greater probability is in favor of the party upon whom the burden rests.

The jury are further instructed that, before you can return a verdict for the plaintiff, you must find from such a fair preponderance of the evidence, as just defined, that at the time the plaintiff was injured, the automobile in question was being used and operated by John Suraci upon or in furtherance of the business of the defendant Mandes, as distinguished from the business or pleasure of said John Suraci. In determining this question as to the use being made of the automobile at the time in question, you will consider all the facts and circumstances in evidence concerning and relating to such use; and, if you find that the automobile was at the time referred to being used by John Suraci for his own business or pleasure, *and not upon the defendant's business*, then your verdict should be for the defendant, as the defendant Louis Mandes would not be liable for the injuries which plaintiff sustained.

(Italicised clause inserted by the Court and granted as amended—exception for plaintiff.)

9.

The jury are instructed that if they find from the evidence that the defendant Mandes instructed John Suraci to take the automobile in question and deliver the defendant's bakery goods to his own lunch-rooms, one of which, on the day of the accident, was North of G Street, and that he was not instructed by the defendant Mandes to go anywhere else on the defendant's business, and that Suraci drove the automobile to his own place of business at 435 R Street, and to the place of the accident at Eleventh Street and Rhode Island Avenue, and in so doing deviated from the course in which he should have driven in making the deliveries of the defendant, their verdict must be for the defendant.

(Refused & exception.)

64 But the court refused to grant certain of defendant's requested instructions, as hereinbefore noted, to which action of the court counsel for the defendant then and there asked exceptions, which exceptions were allowed and duly noted on the minutes of the court.

Thereupon, the court instructed the jury as follows:

"The Court (Mr. Justice Stafford): Gentlemen of the Jury, counsel have kept within the line of the law in arguing this case to you, and it is really hardly necessary for me to charge you at all. But as I told counsel I would call attention to the essential parts of the declaration, which must be proved in order to entitle the plaintiff to recover, I will outline the case.

"The theory of the declaration is that the plaintiff was injured through the negligence of one who at the time was a driver and employee of the defendant, and that at the very time when the accident occurred, he was acting within the scope of his employment. It is not enough to prove in such a case that the defendant owned the machine. That is not the question. The evidence as to ownership has its bearing on the question of agency, but the question is not one of ownership, but one of agency. The case has been somewhat simplified by the concession of counsel in his argument to you that the accident occurred through the negligence of Suraci, the driver. So that I will say nothing about that. But the declaration alleges that Suraci, the driver, was at the time in the business of the defendant Mandes, was acting for him in the scope of his employment, as a driver in Mandes' business, and the contention before you in the evidence and the argument has been as to whether that was true or not.

"It was for the plaintiff, of course, to make that out by a fair preponderance of the evidence, as has been explained to you by counsel in the argument. You are to consider all the evidence in the case upon both sides bearing upon that question, and decide whether, at the time this accident occurred, Suraci was acting for Mandes in and about Mandes' business, as alleged in the declaration.

"When you take all the circumstances in the case as established by the evidence into consideration, all the testimony of the witnesses throwing any light upon that question, are you of opinion that the balance of the evidence is in favor of the plaintiff upon that proposition? If you are not, the defendant is entitled to your verdict.

"It is a question of fact. What one does by another is in law the same as if it was done by himself. If Suraci was driving this machine for Mandes, in the business of Mandes at the time, it is exactly the same as if Mandes had been driving it.

65 "If, on the other hand, Suraci was driving it, not in Mandes' business, but upon his own business, or for his own pleasure, then, of course, there is no reason why Mandes should be liable for the negligence of Suraci, and he would not be, as a matter of law.

"I think that is all I need to say to you on the question of liability, unless counsel wish me to develop the matter more fully.

"If you do not find by a preponderance of the evidence in favor of the plaintiff upon this proposition, you will return a verdict for the defendant. If, however, you find in favor of the plaintiff upon this question, then you come to the question of damages, and the instruction that has just been read to you by the plaintiff's counsel is the law of the case. I shall not read it to you again.

"There is one point that I promised counsel I would speak to you about. There was evidence introduced as to the loss of memory or the part of the plaintiff. That evidence had to be admitted as one of the symptoms of the case, but there is no claim in the declaration for incapacity in respect of memory, and therefore you could not allow damages, in any event, to the plaintiff, based upon his loss of memory. If that claim was to have been made, it was necessary to have it put in the declaration.

"Do counsel care for any other further particular instruction?"

Mr. Colladay: Nothing, Your Honor.

The jury having returned a verdict for plaintiff, a motion for a new trial was duly made, which motion was by the court overruled, to which action of the court in overruling said motion counsel for defendant asked an exception, which exception was by the court allowed and then and there duly entered on the minutes of the court.

The foregoing bill of exceptions contains the substance of all the testimony in the case touching and concerning the question of the ownership of the automobile at the time of the accident in question; the relation existing between the defendant Mandes and John Suraci, the operator of the Machine at the time; whether at the time, the latter was the agent or servant of the former; and whether the automobile was at the time of the accident on the business of the defendant Mandes.

And all the exceptions hereinbefore referred to were noted on the minutes of the court as they were severally taken, and the defendant prays the court to sign and seal this bill of exceptions to have the same force and effect as if the rulings herein contained were set out in separate bills of exception; which is accordingly done this 21st day of April, A. D. 1919, nunc pro tunc.

WENDELL P. STAFFORD, *Justice.*

Settled by consent this 21st day of April, 1919.

EDWARD S. DUVALL,
Attorney for Plaintiff.

E. F. COLLADAY,

B.,

O. H. OSTERMAN,

B.,

Attorneys for Defendant.

Endorsed on cover: District of Columbia Supreme Court. No. 3272. Louis Mandes, appellant, vs. Thomas O. Midgett. Court of Appeals, District of Columbia. Filed Apr. 30, 1919. Henry W. Hodges, clerk.

RETURN TO WRIT OF CERTIORARI.

Court of Appeals of the District of Columbia.

OCTOBER TERM, 1919.

No. 3272.

LOUIS MANDES, APPELLANT,

vs.

THOMAS O. MIDGETT.

FILED OCTOBER 14, 1919.

Supreme Court of the District of Columbia.

Friday, January 31st, 1919.

Session resumed pursuant to adjournment, Hon. Wendell P. Stafford, Justice presiding.

* * * * *

No. 59769. At Law.

THOMAS O. MIDGETT, Plaintiff,

vs.

LOUIS MANDES, Defendant.

Come again the parties hereto, in manner aforesaid, and the same jury that was respited yesterday and thereupon, the plaintiff by his attorneys submits to a voluntary nonsuit on the third count of his declaration; wherefore as to said third count it is considered that the plaintiff take nothing, that the defendant go hence without day and as to said third count be for nothing held. This cause thereupon pro-

ceeds but not being completed at the adjournment hour, the jury is respited until Monday next at 10 o'clock a. m.

Supreme Court of the District of Columbia.

I, John R. Young, Clerk of the Supreme Court of the District of Columbia, do hereby certify, in obedience to the Writ of Certiorari hereto attached and returned herewith, the foregoing to be a true and correct copy of the minute entry, Volume 67, page 167, Law Minutes, of January 1st, 1919, in the case of Thomas O. Midgett vs. Louis Mandes, heretofore transmitted to the Court of Appeals of the District of Columbia.

In testimony whereof, I hereunto subscribe my name and affix the seal of said Court, at the City of Washington, in said District, this 13th day of October, 1919.

[Seal Supreme Court of the District of Columbia.]

JOHN R. YOUNG,
Clerk,

By E. M. MEIGS,
Assistant Clerk.

Filed Oct. 7, 1919. J. R. Young, Clerk.

THE UNITED STATES OF AMERICA, ss:

The President of the United States of America to the Honorable the Justices of the Supreme Court of the District of Columbia, Greeting:

Whereas in a certain suit in said Supreme Court between Thomas O. Midgett, Plaintiff, and Louis Mandes et al., defendants, Law No. 59769 which suit was removed to the Court of Appeals of the District of Columbia by virtue of an appeal, agreeably to the act of Congress in such case made and provided, a diminution of the record and proceedings of said cause has been suggested, to wit:

Minute entry of January 31, 1919 (Minute Book 67 page 167) reading as follows:

"Jany Term	Thomas O. Midgett, Plaintiff,	
1919	vs.	No. 59769
Jany 31/19	Louis Mandes, Defendant.	

Come again the parties hereto, in manner aforesaid and the same jury that was respited yesterday and thereupon the plaintiff by his attorney submits to a voluntary nonsuit on the third count of his declaration; wherefore as to said third count it is considered that the plaintiff take nothing, that the defendant go hence without day and as to said third count be for nothing held. This cause thereupon

proceeds but not being completed at the adjournment hour, the jury is respited until Monday next at 10 o'clock A. M."

You, therefore, are hereby commanded that, searching the record and proceedings in said cause, you certify what omissions, to the extent above enumerated, you shall find to the said Court of Appeals, so that you have the same, together with this writ, before the said Court of Appeals forthwith.

Witness the Honorable Constantine J. Smyth, Chief Justice of the said Court of Appeals, the 7th day of October, in the year of our Lord one thousand nine hundred and nineteen.

[Seal Court of Appeals, District of Columbia, 1893.]

HENRY W. HODGES,
*Clerk of the Court of Appeals of the
District of Columbia.*

[Endorsed:] Law. 59769. Court of Appeals of the District of Columbia. No. 3272, April Term, 1919. Louis Mandes, Appellant, vs. Thomas O. Midgett. Writ of Certiorari. Filed Oct. 7, 1919. J. R. Young, Clerk.

[Endorsed:] No. 3272. Louis Mandes, Appellant, vs. Thomas O. Midgett. Return to Writ of Certiorari. Court of Appeals, District of Columbia. Filed Oct. 14, 1919. Henry W. Hodges, Clerk.